81-1016

No._____

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In The Supreme Court of The United States

October Term, 1981

GERALD A. AKERS

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

No. _____

GERALD A. AKERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, GERALD A. AKERS, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 31, 1981.

QUESTIONS PRESENTED

1. Whether Petitioner's Fourth Amendment rights were violated by government agents' action in seizing Petitioner's suitcase from a common carrier and searching it without a warrant.

2. Whether the Court below unconstitutionally determined that Petitioner voluntarily abandoned his suitcase by merely exercising his constitutional rights under the Fifth Amendment.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals of August 31, 1981, is not reported at this date but is set forth verbatim in Appendix "A" at pages 26 through 31.

JURISDICTION

On August 31, 1981, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner for conspiracy and possession of cocaine with intent to distribute in violation of Title 21, United States Code, Sections 846 and 841 (a)(1). The same Court denied a petition for rehearing on October 29, 1981 as set forth in Appendix "B" at page 32. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1) and Rule 17.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A two count indictment was filed in the United States District Court for the Southern District of California charging Petitioner with conspiring to possess a controlled substance with intent to distribute and possession of a controlled substance with intent to distribute in violation of 21 U.S.C. and 846 and 21 U.S.C. 841(a)(1).

On March 7, 1978 Motions to Suppress Evidence were filed and a hearing was held. The motions to suppress evidence were denied and the case proceeded to trial without jury upon a stipulation of counsel. The trial included evidence presented at the motion to suppress hearing and a written stipulation. A finding of guilty on both counts of the indictment was made by the Judge sitting without jury.

Petitioner was committed to the custody of the Attorney General on each of the two counts for a period of four (4) years under 18 U.S.C. 4205 (b)(2) and in addition a fine of two thousand five hundred dollars ($2,500.00) was imposed on both counts with the sentence as to both fine and imprisonment to run concurrent with each other. A special time of parole of five (5) years was also imposed.

The facts of the case are as follows:

On October 17, 1979 San Diego County Narcotic Task Force Agent Petrick received information from Narcotic Agents in the Ft. Lauderdale, Florida area that two individuals that were possible narcotics traffickers were leaving Ft. Lauderdale for San Diego on a National Airlines flight 39. (R.T.4-6. All page references herein are to the reporter's transcript) The individuals fitting the drug enforcement administration drug courier profile were identified as the Petitioner and his co-defendant Kendall. (R.T. 6, 76).

When National Airlines flight 39 arrived at San Diego's Lindberg Field, United States Customs Service Dog Handler Dimick passed a specially trained narcotics detection dog named "Duster" over the luggage off-loaded from the airplane. The dog alerted on two separate bags

belonging one each to Petitioner and Co-Defendant Kendall. (R.T. 14 and 15) The dog did not "alert" or react to the presence of narcotics in the third bag (referred to as the "Estrada Bag" which was later found to contain concaine. (R.T. 10-11).

While "Duster" was sniffing out the luggage other Narcotics Task Force Agents observed Petitioner deplane and proceed to the men's room. (R.T. 18). Co-Defendant Kendall went directly outside the terminal and used a public pay phone (R.T. 19).

Petitioner and Co-Defendant were then observed in the luggage claim area where Petitioner spoke a few words to Co-Defendant, and an elderly gentleman, and twice looked under the shoot where luggage was expected to enter the baggage carousel (R.T. 19, 62, 70).

When the baggage did arrive Co-Defendant Kendall picked up a brown suitcase and walked outside the terminal towards a taxi followed by Agents Perkins and Keltz. (R.T. 20) Agents Perkins and Keltz then approached Kendall, indentified themselves and asked him to accompany them back to their office to conduct a narcotics investigation (R.T. 21). Kendall was then escorted across the traffic lane to the sidewalk adjacent to the terminal, after setting the suitcase down he took out his wallet and noticed that a claim stub in his wallet did not match the tag on his suitcase. Kendall called this fact to the agents' attention and claimed he was not trying to steal the suitcase. (R.T. 22, 42, 51, 70, 91-93).

Agent Flores then took the suitcase Kendall had been carrying and placed it back on the National Airlines baggage

carousel and picked up a suitcase matching the claim stub in Kendall's possession. (R.T. 23, 33, 34, 82).

Petitioner was observed to follow Kendall out of the terminal and he was stopped by other agents (R.T. 22, 65). Petitioner and Kendall were then taken to separate interview rooms. At first Kendall denied knowing Petitioner and then said he did. (R.T. 24). Petitioner said he had just met Kendall on the airplane (R.T. 67). Both Petitioner and Kendall gave consent for a search of the suitcases they were carrying. (R.T. 25, 67). These searches revealed no contraband and the Petitioner and Kendall were released. (R.T. 25, 34-35).

After Petitioner and Kendall had left the airport, Agent Keltz went to National Airlines and obtained the bag from a ticket agent stating that he was conducting a narcotics investigation. (R.T. 79).

This bag had been returned by Agent Flores to the National Airlines carousel and was being held by National Airlines as an unclaimed suitcase. (R.T. 42-43, 82-84). Agent Keltz returned to his office with the suitcase bearing the name "Estrada" and it was immediately forced open by Agents Flores and Petrick. (R.T. 46, 84). No search warrant or consent to search had been obtained prior to the opening of the suitcase. (R.T. 53-54).

Inside the suitcase Agent Flores observed some female clothing and a towel. Upon moving these items he noticed three plastic bags containing coffee. These bags were further examined and found to contain the suspected cocaine.(R.T. 16-47).

Agent Perkins testified that he personally determined that the address on the name tag on the bag laden with cocaine was not a valid address shortly after the

suitcase was opened. (R.T. 36). Forty-five minutes after the suitcase had been forced open Agent Perkins personally went to National Airlines and learned that there was no passenger named "Estrada" on flight 39 from Florida.

At the motion to suppress hearing Petitioner testified that he purchased a portion of the cocaine in Florida and packed it in the suitcase which he jointly used with Mr. Kendall. (R.T. 102, 107). Petitioner purchased a ticket under the name "Estrada" from Habor Travel Agency (R.T. 110, 112). Petitioner had an unnamed friend check this bag onto flight 39 (R.T. 107) and he kept the claim check until several weeks after the flight. (R.T. 103, 111).

Mr. Kendall likewise testified and admitted that he and Petitioner jointly used the suitcase to transport cocaine to San Diego (R.T. 96, 89-90).

Mr. Kendall also testified defendant had the claim check for the "Estrada" bag and that the following day and thereafter several attempts were made to claim the suitcase from National Airlines (R.T. 91-92, 112-113).

Defendant was convicted on both counts of the indictment following the denial of the motion to suppress evidence at a Stipulated facts trial (R.T. 142, 143).

REASONS FOR GRANTING THE WRIT

Petitioner had a reasonable expectation of privacy in luggage held by a common carrier and for which he possessed a valid claim check. This expectation of privacy was violated by a warrantless seizure and search of the suitcase and cannot be constitutionally tolerated merely because Petitioner exercised his Fifth Amendment rights by failing to volunteer information about the suitcase.

The threshold issue under this discussion of the Fourth Amendment focuses on the fact that warrantless governmental intrusions into the reasonable expectations of personal privacy are a violation of the Constitution Jones v. United States 357 U.S. 493, 498-99 (1958). This

requirement of the government obtaining a warrant before invading the personal privacy of one of its citizens has been stringently applied by this Court. One notable exception, among others, is that, if a person voluntarily abandoned property, he has no standing to complain of its search or seizure without a warrant. Abel v. United States 362 U.S. 217, 240-241 (1960).

Abandonment is an issue of intent and must be determined by inference from the objective facts. "Abandonment here is not meant in the strict property right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." United States v. Jackson 544 F.2d 407, 409 (9th Cir. 1976 emphasis added). In assessing the factual situation presented by the present

controversy and attempting to apply the principles just enunciated the Court below stated:

> The primary question on appeal is whether abandonment is to be determined by reference to subjective intent or by reference to the objective manifestation of an individual's intent, i.e., whether a subjective or an objective test applies.

The Court incorrectly perceived that Petitioner and his Co-Defendant in the consolidated appeal were arguing for the application of a subjective test instead of the precendented objective standard. This misconstruction of Petitioner's argument left the central constitutional question unanswered.

Petitioner's claim is simple: his luggage was in the custody of National Airlines and it was reasonable (objectively) for Petitioner to maintain an expectation (subjectively) that his suitcase was an item of personal property

entitled to constitutional protection. This subjective expectation is one recognized by this Court. Robbins v. California ___ U.S. ___, 101 S.Ct. 2841, 2846 (1981).

Only Petitioner had the legal means to retrieve his suitcase from National Airlines (the claim check). It was reasonable for Petitioner to expect that his luggage would remain secure and free from warrantless governmental seizure while in the control of the common carrier. This Court has previously recognized Petitioner's expectation as reasonable Walters v. United States, 447 U.S. 649, 658-659 (1979).

In its misconstruction of Petitioner's argument the Court below found:

> Even if Appellant's claim that by their scheme involving the "Estrada" bag they fully intended to retrieve the suitcase in the event Kendall was stopped, Kendall's words and conduct involving the mis-matching claim check clearly conveyed, and the narcotics agents reasonably inferred that Kendall had no

reasonable expectation of privacy in the bag, i.e. that he abandoned it.

This was not the situation of throwing an object out of the window of a moving automobile or placing the suitcase on the sidewalk and walking away from it, or denying any knowledge of the luggage as were the facts in United States v. McLaughlin, 525 F.2d 517, 519 (9th Cir. 1975); and United States v. Colbert, 474 F2d 147, 175 (6th Cir. 1973); and Lurie v. Oberhauser, 431 F.2d 330, 333 (9th Cir. 1970). There was no abandonment of the suitcase by Co-Defendant Kendall. His actions propelled the suitcase back into National Airlines custody. Even assuming arguendo that Co-Defendant did abandon the suitcase or that it was not his, there are no facts to justify a conclusion that Petitioner abandoned his suitcase. Petitioner did nothing to lead a reasonable person to believe he

abandoned the suitcase. Indeed the Court noted:

> The question of whether Akers abandoned the suitcase is more difficult. However, on the facts of the case and according to the objective test for intent, we find that Akers also abandoned the suitcase. Although never questioned about the "Estrada" bag, Akers observed Kendall disclaim interest in it. When detained shortly afterward, Akers consented to a search of his suitcase but concealed the fact that he carried the claim check for the "Estrada" bag.

As the Court recognized in United States v. Jackson, 544 F.2d 407 (9th Cir. 1976) the critical evaluation of the reasonable expectation of privacy must be made at the "time of the search", Jackson supra, at 409. At the time agents seized the suitcase of Petitioner, he had a recognized expectation that it would be secure from warrantless examination of the type conducted by the agents, who, in this instance broke the lock and rummaged through it contents.

As the Court below observed Petitioner was not questioned about the suitcase nor did he do anything to warrant a conclusion of abandonment. On the contrary, he observed his suitcase safely returned to the care and custody of National Airlines. Because Petitioner exercised, at least partially, his right to remain silent under the Fifth Amendment ("...but concealed the fact that he carried the claim check for the 'Estrada' bag.") does not justify a waiver of his Fourth Amendment rights in connection with the property. Such a conclusion would place Petitioner in a constitutionally impermissible dilemma similar, but not analogous, to that facing defendants in Leary v. United States 395 U.S.6 (1968) and Marchetti v. United States 390 U.S.39 (1968). Clearly, had Petitioner produced the claim check to his suitcase, the so-called "Estrada"

bag, he would have been afforded the constitutional protections of the Fourth Amendment. Petitioner's failure to disclose this fact did not propel his suitcase into the agents' hands as in an abandonment. Its seizure at a later time from the lawful control of the common carrier violated Petitioner's reasonable expectation of privacy.

Under these circumstances, Petitioner no more abandoned his suitcase than hundreds of other citizens utilizing common carriers, whose baggage, for one reason or another, arrives on a flight other than the one carrying its owner. Luggage remaining unclaimed several hours after a flight cannot be presumed abandoned as the government's agents concluded in this case.

The decision of the Court below stretches the concept of abandonment to parameters widely expanded beyond previous

Fourth Amendment decisions. Petitioner's suitcase was secured in the agents' custody and "...safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." United States v. Chadwick 443 U.S.1, 13 (1977). The condonation of the illegal intrusion by the government agents in this case would be an open invitation to violate the rights of privacy of substantial numbers of citizens who travel as passengers on the nation's common carriers.

CONCLUSION

Petitioner, therefore, respectfully submits that a writ of certiorari should issue to review the judgment below that luggage left in custody of common carriers may not be considered abandoned and that Petitioner's assertion of his Fifth Amendment privilege would not

constitute a waiver of his protections under the fourth Amendment.

Dated: _____ Respectfully submitted,

By: _____

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APPENDIX "A"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Peter M. KENDALL,

Defendant-Appellant.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gerald A. AKERS,

Defendant-Appellant.

Nos. 80-1306, 80-1312.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted October 8, 1980.

Decided August 31, 1981.

Appeal from the United States District Court for the Southern District of California.

Before NELSON and BOOCHEVER, Circuit Judges and WILLIAMS,* District Judge.

SPENCER WILLIAMS, District Judge:

Appellants Kendall and Akers appeal their convictions for conspiracy and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). Following denial of their motions to suppress the contraband by the trial court, defendant-appellants waived trial by jury and on March 14, 1980 were found guilty on stipulated facts. Using an objective test standard as determinative for intent to abandon, the trial court found appellants had abandoned the suitcase containing the cocaine,

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* Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

thereby relinquishing any reasonable expectation of privacy in it. Consequently, the court found that appellants lacked standing to complain of the subsequent warrantless search. We agree with the lower court's use of the objective test to determine abandonment and affirm both the denial of the motions to suppress and the convictions.

Factual Background

On October 17, 1979, San Diego narcotics agents were alerted by Fort Lauderdale, Florida narcotics agents that appellants were flying to San Diego for the supposed purpose of delivering cocaine. The San Diego agents were given descriptions of appellants as well as descriptions of their luggage and appellants were placed under surveillance upon their arrival in San Diego. At the baggage claim area, appellant Kendall

picked up a suitcase meeting the description given to the agents and upon leaving the terminal, was stopped and requested to return to the terminal for questioning. While accompanying the agents, Kendall removed his baggage claim check from his wallet and informed them that his name was not on the suitcase name tag and that the claim check numbers did not match. The name on the bag was "Estrada" or "Estarda". At trial Kendall admitted that the purpose of his words and conduct was to give the officers the impression that he had no interest in the bag. Believing Kendall's disclaimer, one of the agents returned the "Estrada" bag to the baggage carousel and returned with a similar bag whose numbers matched Kendall's claim check. In the meantime, appellant Akers was stopped as he followed and observed Kendall. Although Akers was

not questioned regarding the "Estrada" bag, both appellants consented to a search of their suitcases. Nothing chargeable was found and they were released. However, unknown to the agents, Akers carried the claim check for the "Estrada" bag but he made no attempt to retrieve it before leaving the airport.

Subsequently, the agents checked the passenger list and determined that no passenger named "Estrada" or "Estarda" had been on the flight. Although they did not have a search warrant, they picked up the "Estrada" bag from the baggage claim area and upon returning to their office, forced it open and found approximately three pounds of cocaine in hermetically sealed plastic bags.

After leaving the airport, appellants made several attempts to reclaim the bag. At trial they testified that although

Kendall owned the "Estrada" suitcase, they jointly packed it and each owned some of the cocaine.

Abandonment

Intent to retain a reasonable expectation of privacy is determinative of abandonment. United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976). A person who voluntarily abandons property has no standing to complain of its search and siezure. Abel v. United States, 362 U.S. 217, 240-41, 80 S.Ct. 683, 697-698, 4 L.Ed. 1019 (1960). The primary question on appeal is whether abandonment is to be determined by reference to subjective intent or by reference to the objective manifestation of an individual's intent, i.e., whether a subjective or an objective test applies. Appellants contend that subjective intent is the proper test, that their scheme

involving the identical "Estrada" suitcase is evidence of their intent to return for the suitcase and, therefore, that there was no abandonment. Consequently, they argue that their motions to suppress were erroneously denied. However, appellants misread the opinion of this court in United States v. Jackson, 544 F.2d 407 (9th Cir. 1976) and they disregard pre-Jackson cases which use objective standards to determine intent to abandon.1/

The Objective Standard

United States v. Jackson, provides that the question of abandonment:

1/ See United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904, 96 S.Ct. 3190, 49 L.Ed.2d 1198 (1976); United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); Lurie v. Oberhauser, 431 F.2d 330 (9th Cir. 1970).

> is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. Abandonment . . . rests . . . on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.

Id. at 409 (emphasis added)(citations omitted). Whether a person entertains a reasonable expectation of privacy is to be determined by objective standards. United States v. Pruitt, 464 F.2d 494, 496 (9th Cir. 1972).

In Jackson, defendant, seeing law enforcement officers approach, dropped his suitcase and began to walk away before being stopped. The court held there was no abandonment because defendant's conduct did not "indicate an intent to abandon the suitcase." Id. at 410. Although the court does not expressly indicate that it used the objective standard, it

did state that "intent may be inferred from words, acts and other objective facts." Id. at 409. Furthermore, the cases cited by Jackson support an objective rather than a subjective test for intent to abandon.2/

In the case at bar, the trial court relied upon the case of Lurie v. Oberhauser, 431 F.2d 330 (9th Cir. 1970), rehearing denied, October 14, 1970, as permitting the objective standard. In Lurie, defendants, suspected of burglary and robbery, were apprehended while waiting for an airline flight. Their suitcases were retrieved and each airline identification tag was matched with the baggage claim checks held by the

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2/ United States vs. Maryland, 479 F.2d 566 5th Cir. 1973); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973); United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975).

defendants. Defendants gave consent to search all the suitcases except one, and each disclaimed both ownership and knowledge of it. A warrantless search of the suitcase revealed the stolen property. A motion to suppress was denied and defendants were convicted. In affirming the convictions, the Lurie court stated:

> The appellants disclaimed any proprietary or possessory interest in the incriminating evidence and by so doing abandoned whatever interest they might have had in the property from possession of the claim check. Having abandoned the suitcase they have no standing to object that the search of the suitcase was not incident to their arrest.

Id. at 333. The court focused on the defendants' disclaimer without inquiring

into defendants' actual state of mind.3/

Similarly, in United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904, 96 S.Ct. 3190, 49 L.Ed.3d 1198 (1976) defendants' objective conduct was held determinative of abandonment. Defendants drove a pick up truck suspected of carrying marijuana. As narcotics officers attempted to stop the vehicle, defendants threw four kilos of marijuana from the truck. The court found that defendants abandoned the marijuana and no inquiry was made whether defendants subjectively intended to return for the

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3/ For further examples of disclaimer of knowledge and ownership as a basis for abandonment see United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973).

contraband.

The objective test for abandonment which we think is consistent with Jackson and the cases cited therein is most definitively stated in United States v. Williams, 569 F.2d 823 (5th Cir. (1978). In Williams, narcotics agents followed a truck and trailer driven by defendant and believed to be transporting marijuana. When defendant became aware he was being followed, he drove into a reststop area, unhitched the trailer and drove off. The narcotics agents then made a warrantless search of the trailer and found marijuana. Later that evening defendant returned to the trailer and was arrested. He was subsequently convicted of conspiracy to possess with intent to distribute marijuana. Defendant's conviction was later affirmed on appeal, the court finding that no Fourth Amendment

rights of defendant had been violated by the warrantless search because defendant's conduct objectively indicated an intent to abandon. Id. at 826. Quoting United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) which has similar language to Jackson, the Williams court stated:

> One has no standing to complain of a search or seizure of property he has voluntarily abandoned . . . . Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. . . .

Id. at 826 (emphasis added). The court reasoned:

> In the case at bar [defendant] Williams knew he was followed by government officers. His only conceivable purpose in leaving the trailer unguarded and unlocked in the parking area was to rid himself of the vehicle with its incriminating contents. Perhaps, he retained a hope that he might accomplish two objects: the protection of himself from possession of

> evidence while he was pursued, and the chance of recovery of the trailer if neither the officers nor anyone else took it. . . . Williams was just like the bank robber who having a gun, finds himself pursued, and in his hope of escaping detection throws the gun into a yard -- where, if it is not picked up he might retrieve it. Such conduct is transparently an abandonment of the tight grip of ownership and reliance solely on the feeble hope of reacquisition.

568 F.2d at 826 (emphasis added).

Appellants' Conduct

Examining appellant Kendall's conduct objectively, we find that he abandoned the suitcase containing the contraband prior to the warrantless search. Even if appellants claim that by their scheme involving the "Estrada" bag they fully intended to retrieve the suitcase in the event Kendall was stopped, Kendall's words and conduct involving the mismatching claim check clearly conveyed, and the narcotics agents reasonably inferred, that Kendall had no reasonable expectation

of privacy in the bag, i.e., that he abandoned it.

To hold otherwise would be contrary to the cases cited and contrary to public policy. Allowing schemes such as appellants' to succeed would not deter improper police conduct, but would reward defendants who initially indicate that property is abandoned but who later claim Fourth Amendment protections after contraband is found pursuant to a warrantless search.

The question of whether Akers abandoned the suitcase is more difficult. However, on the facts of the case and according to the objective test for intent, we find that Akers also abandoned the suitcase. Although never questioned about the "Estrada" bag, Akers observed Kendall disclaim interest in it. When detained shortly afterward, Akers consented to a search of his suitcase but concealed the

fact that he carried the claim check for the "Estrada" bag.

When these facts are coupled with the information that no one on the flight was named "Estrada" we cannot say that the trial court erred in finding abandonment.

Conclusion:

The trial court's finding of abandonment is a factual finding and, even where arguably mixed with questions of law, is subject to attack only if clearly erroneous. See United States v. Hart, 546 F.2d 798, 801-02 (9th Cir. 1976)(en banc), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 571 (1977). We are further aware of the Supreme Court's admonishment in Ker v. California, 374 U.S. 23, 33-34, 83 S.Ct. 1623, 1629-1630, 10 L.Ed.2d 726 (1963).

> . . . While this Court does not sit in nisi prius to appraise

> contradictory factual questions, it will where necessary to the determination of constitutional rights, make an independent examination of the facts, the finding, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected.

We have made such an independent examination and hold that the trial court did not err in concluding that both Kendall and Akers abandoned the suitcase. Appellants' motions to suppress were properly denied and their judgments of conviction were properly entered. Accordingly, the judgments of conviction are hereby affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 80-1306
Plaintiff/ Appellee,	)	D.C. No. 79-0878
v.	)	
PETER M. KENDALL,	)	ORDER
Defendant/ Appellant.	)	

Before: Nelson and BOOCHEVER, Circuit Circuit Judges, and WILLIAMS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing,

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* Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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Nos. 81-1016 and 81-1017

In the Supreme Court of the United States

OCTOBER TERM, 1981

GERALD A. AKERS, PETITIONER

v.

UNITED STATES OF AMERICA

PETER M. KENDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court correctly determined that petitioners had abandoned a piece of luggage that contained cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1016

GERALD A. AKERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-1017

PETER M. KENDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-31)[1] is reported at 655 F. 2d 199.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1981. A petition for rehearing was denied on October 29, 1981 (Pet. App. 32). The petitions for a writ of

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[1]"Pet. App." refers to the appendix to the petition in No. 81-1017.

certiorari were filed on November 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioners were convicted of possession of cocaine with intent to distribute and of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846, respectively. They were each fined $2,500 and sentenced to four years' imprisonment and a five-year special parole term. The court of appeals affirmed (Pet. App. 27-31).

Evidence developed at a suppression hearing showed that on October 17, 1979, narcotics agents in Florida alerted agents in San Diego, California, that petitioners were flying to San Diego for the purpose of delivering cocaine (Pet. App. 28). The San Diego agents were given descriptions of petitioners and the claim check numbers and descriptions of the luggage suspected of containing cocaine (*ibid.*; H. Tr. 4-8).[2] When the flight arrived in San Diego, the agents observed petitioners deplane and meet in the baggage claim area. Petitioner Kendall retrieved a suitcase matching the description given by the Fort Lauderdale police, and, when he left the terminal, the agents approached him and requested that he return for questioning in connection with a narcotics investigation. Another agent approached petitioner Akers and requested that he also return to the terminal for questioning (Pet. App. 28; H. Tr. 21-22, 65, 77).

While accompanying the agents back to the terminal, Kendall removed a baggage claim check from his wallet, showed the agents that the number on it did not correspond with the number on the suitcase he was carrying, which bore

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[2] "H. Tr." refers to the transcript of the suppression hearing.

the name Estrada or Estarda, and stated "that's not my bag." When an agent asked what he was doing with the bag, he responded, "I am not stealing it" (H. Tr. 42, 78). The agents then returned to the baggage carousel, placed the suitcase on it, and picked up an identical brown bag that Kendall identified as belonging to him. The claim check number on that bag corresponded with the number on Kendall's ticket (H. Tr. 42-43).

Petitioners both consented to searches of their luggage, which did not reveal any contraband (Pet. App. 28). After petitioners left, the agents determined that no person named Estrada had been a passenger on petitioner's flight and that the address on the suitcase bearing that name was fictitious. They retrieved the Estrada suitcase, which was the only one that had gone unclaimed, from the baggage claim area and opened it. The suitcase contained approximately three pounds of cocaine in hermetically sealed plastic bags (Pet. App. 28-29; H. Tr. 46-48, 78-79).

At the suppression hearing, Kendall testified that his reason for inviting the agents' attention to the name and claim check number on the suitcase was to induce them to believe that the bag was not his so they would return it to the baggage area. He further explained that, because Akers had a claim check to the bag, the ploy would enable them to retrieve it at a later time. Both petitioners claimed ownership of the bag and the cocaine found in it (H. Tr. 91-103).

2. Ruling that petitioners had abandoned the suitcase, the trial judge denied their suppression motions (H. Tr. 131-132). He found that "[t]he testimony of both defendants, * * * certainly by their actions that day, and by their testimony here in court, would support the inference that was intended to be given to the officers, that of disowning any interest whatsoever in the bag" (*id.* at 132).

The court of appeals affirmed. After conducting a thorough review of the facts, the court held that petitioners' objective manifestations with respect to the suitcase fully supported the trial judge's finding that they had abandoned it (Pet. App. 31).

ARGUMENT

Petitioners contend (81-1016 Pet. 16-24; 81-1017 Pet. 15-24) that the evidence failed to establish an abandonment of their proprietary interests in the suitcase and therefore that they retained a reasonable expectation of privacy in its contents. This fact-bound question was resolved against petitioners by two courts below, and further review by this Court is unwarranted. Moreover, on the particular facts of this case, the courts below correctly held that the suitcase had been abandoned.

The legal principles governing petitioners' factual claim that they did not abandon the suitcase are not in dispute. If a person has voluntarily abandoned property, he may not challenge the legality of its search and seizure. See *Abel* v. *United States*, 362 U.S. 217, 241 (1960). The basis of this principle is that "upon abandonment, the party loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private." *United States* v. *Veatch*, 647 F. 2d 995, 998 (9th Cir. 1981) (footnote omitted). Abandonment is a question of the owner's intent as manifested to an objective observer by the owner's "words, acts and other objective facts." *United States* v. *Cella*, 568 F. 2d 1266, 1283 (9th Cir. 1978). See also *United States* v. *Sampol*, 636 F. 2d 621, 683 (D.C. Cir. 1980).

Here, Kendall expressly told the agents that the suitcase in question was not his (H. Tr. 22, 42). There is no doubt that such a denial of ownership constituted an objective manifestation of abandonment. See, *e.g.*, *United States* v.

Veatch, supra, 647 F. 2d at 999 (collecting cases); *United States* v. *Canady,* 615 F. 2d 694, 696-697 (5th Cir.), cert. denied, 449 U.S. 862 (1980); *United States* v. *Miller,* 589 F. 2d 1117, 1131 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States* v. *Colbert,* 474 F. 2d 174, 176-177 (5th Cir. 1973) (en banc). Indeed, not only did Kendall assert that the bag was not his, he also sought to bolster that assertion by showing the police that the number on it did not match the number on the stub of his claim ticket and by pointing out a similar suitcase that he stated was his bag. Moreover, he candidly admitted during the suppression hearing that these measures were calculated to cause the police to believe that he had no possessory interest in the bag (H. Tr. 94). He cannot now be heard to complain because his ploy was successful.[3]

Petitioner Akers contends (81-1016 Pet. 20-24) that, assuming Kendall's conduct constituted an abandonment of *his* possessory interest in the suitcase, the facts did not permit the inference that Akers abandoned his interest in it as well. But, as the court below noted (Pet. App. 31), Akers witnessed the proceedings during which Kendall, pointing to the different claim check numbers, disclaimed an interest in the suitcase, resulting in its return to the baggage claim area. Nevertheless, Akers made no effort to assert a property interest in the bag, although, unbeknownst to the police, he was carrying the correct claim ticket for the bag. Indeed, during the suppression hearing Akers admitted that

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[3]Petitioners both contend (81-1016 Pet. 18-20; 81-1017 Pet. 21-22) that they retained an objectively reasonable expectation of privacy in the bag because it was returned to the custody of airlines personnel, and the police suspected it was Kendall's when they later retrieved it. But it is of no consequence whether or not the police later suspected that the bag belonged to Kendall once he had disclaimed ownership of it. His words and actions constituted a renunciation of any further interest in the suitcase and "left him with no reasonable expectation of privacy" in it. *United States* v. *Veatch, supra,* 647 F. 2d at 999.

he and Kendall had prepared the bag so as to enable them to disclaim its ownership in the event of apprehension (H. Tr. 107-109). Thus, it was reasonable for the police to infer that Akers retained no possessory interest in the bag. Moreover, when Kendall disclaimed a possessory interest in the suitcase in accordance with the prearranged plan, he must be held to have acted as Akers' agent in abandoning the suitcase. Cf. *United States* v. *Cella, supra,* 568 F. 2d at 1283-1284 (co-defendants were defendant's agents in directing abandonment of property).[4]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Akers urges (81-1016 Pet. 22) that reliance upon his silence to support the conclusion that he joined Kendall in abandonment of the suitcase infringes upon his Fifth Amendment right against self-incrimination. This contention is insubstantial. While the Fifth Amendment may prevent a defendant's post-arrest silence from being used as evidence of his guilt (see *United States* v. *Hale,* 422 U.S. 171, 177 (1975)), the privilege against self-incrimination has no relevance to the question whether an individual may raise a Fourth Amendment challenge to a particular search. Clearly, a defendant's failure to assert a proprietary interest in seized property may be an objective indicator of whether he retains or has abandoned any privacy interest in that property. See *Rakas* v. *Illinois,* 439 U.S. 128, 148 (1978).